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General Rules of the United States District Court for the Eastern District of Louisiana:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 893

DELVAILLE H. THEARD, PETITIONER

v.

UNITED STATES OF AMERICA[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The order of the District Court (R. 27–28) was entered without opinion. The *per curiam* opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 21–23) is reported at 228 F. 2d 617.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on Januray 6, 1956

[1] This caption seems incorrect since the United States has never been a party to the action. The proceedings in the District Court were captioned: "In Re Delvaille H. Theard, Disbarment Proceedings" (R. 1).

(Pet. App. 23). A petition for rehearing was denied on January 31, 1956 (Pet. App. 23). The petition for a writ of certiorari was filed on April 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED

Whether the District Court for the Eastern District of Louisiana abused its discretion in ordering the disbarment of an attorney who, after notice and full hearing, had been disbarred from practicing law in the state courts of Louisiana for uttering forged documents while in an abnormal mental condition.

RULE INVOLVED

Rule 1 (f) of the General Rules of the United States District Court for the Eastern District of Louisiana provides in pertinent part:

> Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court, he shall be suspended forthwith from practice before this court and, unless upon notice, mailed to him at his last known place of residence, he shows good cause to the contrary within 10 days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix

STATEMENT

This action was commenced by a motion of the United States Attorney to suspend petitioner from practice in the United States District Court for the Eastern District of Louisiana in accordance with its Rule 1 (f), *supra* (R. 2). The motion was based upon an order by the Supreme Court of Louisiana striking plaintiff's name from the roll of attorneys and cancelling his license to practice law in Louisiana. *Louisiana State Bar Association* v. *Theard*, 225 La. 98, certiorari denied, 348 U. S. 832.

The state disbarment proceeding had been instituted by a petition filed by the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association (R. 3).[2] The petition charged that on January 2, 1935, he had forged a note for $20,000 which he had proceeded to notarize to make it appear authentic and then to sell for a valuable consideration (R. 4). Petitioner excepted to the maintenance of the proceeding, on the ground, among others, that at the time he had performed these acts [he] "was suffering from a mental illness which rendered him incapable of guilty or wilful conduct and deprived him of the ability to distinguish right and wrong".

[2] Prior to the institution of the proceeding, the Committee had conducted an investigation and hearing, at which petitioner was present and represented by counsel of his own choice (R. 4).

(R. 6).[3] The exceptions were heard by the Louisiana Supreme Court which held that insanity was not a bar to disbarment (222 La. 328, 335–336):

> * * * In disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi offense, consideration of the interest and safety of the public is of the utmost importance for, whereas it may not be humane to punish by confinement to prison one who labored under the inability to understand the nature of his wrongful acts, it is quite another matter to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honorable profession of counselor-at-law when he, by his misconduct, has exhibited a lack of integrity and common honesty. And in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent.[4]

The Louisiana Supreme Court, accordingly, overruled petitioner's exceptions.

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[3] In addition to insanity, petitioner pleaded prescription, laches and estoppel (R. 5).

[4] In the course of this opinion, the court noted that, in addition to the conduct specifically charged in the disbarment petition, petitioner had been involved in "peculations [which] involved thousands of dollars belonging to his clients and others extending over a considerable period of time," and that petitioner's counsel had himself submitted evidence as to "the public scandal and agitation attendant to the discovery of [petitioner's] embezzlements, forgeries and other breaches of trust * * *" (222 La. at 333–334, n. 2).

Following denial of petitioner's application for rehearing, the proceeding was set for hearing (R. 7). Petitioner then answered, reiterating the substance of his several exceptions including that of insanity, and his claim that the proceeding operated to deprive him of "the procedural due process guaranteed by Section 2 of Article 1 of the State Constitution, and by the Fourteenth Amendment to the Constitution of the United States" (R. 6–7). The Commissioner who had been appointed to take evidence (R. 7) found that petitioner admitted the commission of the wrongful acts (R. 8) but that "it must then, from the record, be held that [petitioner] was suffering under an exceedingly abnormal mental condition, some degree of insanity" (R. 8).[5]

When the proceeding was before it on the commissioner's recommendation of disbarment, the Louisiana Supreme Court again rejected the defense of mental illness in accordance with the view expressed in its earlier opinion (R. 10–11).[6] As to petitioner's claim of deprivation of constitutional rights, the court noted that the right

[5] It appears from the decision in *State* v. *Theard*, 212 La. 1022, 1027, that on December 13, 1937, petitioner applied for the appointment of a lunacy commission, that on April 20, 1938, he was held to be insane, and that he was declared sane on May 11, 1944.

[6] The court noted that its earlier ruling on the mental illness defense "appears to be logically sound; it is supported by competent authority; and no holdings to the contrary have been brought to our attention" (R. 11).

to practice law is not "property" or "a natural or constitutional right," but rather, a privilege or franchise, which once granted falls under constitutional protection, i. e., that "[b]efore a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense" (R. 15). This requirement, the court held, "has been fully met in the instant proceeding" (R. 15). Accordingly, the court ordered petitioner's name removed from its rolls, and cancelled his license to practice law in Louisiana (R. 16). This Court denied certiorari, 348 U. S. 832.

Following the entry of the state order, the present proceeding to disbar petitioner in the District Court for the Eastern District of Louisiana was instituted (R. 2). The order to show cause referred to the state proceedings, a copy of which was attached (R. 3–16), and directed, in accordance with Rule 1 (f) of the District Court, *supra*, that "unless [petitioner] shows good cause to the contrary within ten (10) days, an order of * * * disbarment * * * shall be entered" (R. 3). In response, petitioner urged *inter alia* that the Louisiana court had disbarred him "without just cause or reason and by a decree depriving him of his property without due process of law" (R. 18) and further that the decree of disbarment was based "on an act committed while [petitioner] was the victim of a mental breakdown,

utterly bereft of reason, and unable to distinguish between right and wrong" (R. 19). In so urging, petitioner advised that "if [he] had been disbarred because of misconduct intentional and reprehensible for any reason involving moral turpitude or wilful wrong, [he] would not now undertake to show cause why the decree of the Louisiana Supreme Court should not be operative and binding in [the District] Court" (R. 18).[7]

A hearing was had before the District Court at which petitioner offered no evidence (Pet. App. 23). Following the hearing, the District Court, without opinion entered an order directed that the rule be made absolute and that petitioner's name be removed from the court's roll of attorneys (R. 27–28). On appeal the Court of Appeals affirmed in a *per curiam* opinion (Pet. App. 21–23).

ARGUMENT

Accepting the rule that the District Court may properly direct his disbarment on the basis of a valid disbarment order of the Louisiana Supreme Court, petitioner seeks to utilize the federal court disbarment as a vehicle for obtaining another review, albeit collaterally, of the state court order. Petitioner's request for direct review of the state order has already been denied.

[7] Attached to petitioner's response was a list of the cases he had since 1948 argued in the Louisiana Supreme Court and the Court of Appeals for the Parish of Orleans (R. 25, 26–27).

No. 226, October Term, 1954, 348 U. S. 832. And since the errors in the state disbarment asserted here by petitioner are substantially the same as those advanced in No. 228, the indirect review now sought is *a fortiori* without warrant.

1. This Court has recognized that the federal courts in general do not conduct independent examinations for admission to their bars, but rely instead upon "confidence * * * in the bars maintained by the states of the Union." *In re Isserman,* 345 U. S. 286, 287–288, rehearing granted and petition for disbarment denied, 348 U. S. 1. And this Court has said, with reference to members of its own bar, that while a state court's order of disbarment "is not binding upon us, as the thing adjudged in a technical sense," yet "the necessary effect" of the state court's action, "unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar." *Selling* v. *Radford,* 243 U. S. 46, 50. The Court there held that it would recognize "the condition created by the judgment of the state court" unless that court's procedure was wanting in due process or in proof, or unless "some other grave reason" existed which rendered acquiescence in the state court's view inconsistent with the principle that disbarment

must be based on "principles of right and justice." 243 U. S. at 51. Since, as we will show, petitioner was accorded due process and no "grave reason" was shown by petitioner, the District Court was within its power under its rules to accept the order of the Supreme Court of Louisiana. Indeed, such recognition of the state court's judgment as this Court has enjoined upon itself is called for with greater force in the case of a federal district court which not only serves substantially the same public as the state bar, but whose sole requirement for admission to its bar customarily is admission to the state bar. Surely, an unseemly conflict between such courts should be required only by the gravest of reasons.

2. Petitioner attacks the Louisiana disbarment primarily on the grounds (a) that it operated to deprive him of due process and (b) that his mental illness excused his misconduct and necessarily precluded disbarment. These interlocking contentions cannot withstand examination.

(a) It is undoubtedly true that the right of an attorney to appear and argue before a court, once granted, "is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." *Ex Parte Garland,* 4 Wall. 333, 379. However, when there has been appropriate

notice and opportunity to defend—and the record here clearly shows that these rights were fully awarded petitioner (see the statement, *supra*) — the nonarbitrary determination of a court that the conduct of an attorney of its bar has constituted "moral or professional delinquency" does not present any question for review. As Mr. Justice Bradley wrote for this Court in *Ex Parte Wall*, 107 U. S. 265, 288–289,

> * * * the action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. * * * This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.

(b) Moreover, the basis of the Louisiana order, i. e., that an attorney may be disbarred for improper actions even though taken during mental illness, accords with the accepted rule in other states. See e. g., *Re David Y. Patlak*, 368 Ill. 547; *Re Nicolini*, 262 App. Div. 114 (N. Y., 1st

Dept.); cf. *Re Vincent*, 282 S. W. 2d 335 (Ky.); *Re Manahan*, 186 Minn. 98, 101; *Re Bivona*, 261 App. Div. 221, 222 (N. Y., 1st Dept.); *Re Creamer*, 201 Ore. 343; *In Re Kennedy*, 178 Pa. 232.[8] Wilfulness would be relevant if disbarment were intended as punishment, but that is not its purpose. Rather, as the Louisiana court noted, (R. 10–11), it is ordered as a protection for the public, the courts, and the bar. *Ex Parte Wall*, 107 U. S. 265, 288. Accordingly, it is with the implications of the act rather than with its causation that the courts have been primarily concerned. Balancing the attorney's interest in his profession against the danger that his misconduct may recur and against the suspicion and scandal which may attach to the court and bar in the public mind, the courts have held that the dominant interest requires disbarment of the attorney. Even if one were to support the other position, the generally accepted view cannot be said to be unreasonable or without any foundation.[9]

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[8] Petitioner has cited no case which has held the contrary, and we have found none.

[9] Petitioner's further contention that the state proceeding was barred by laches and prescription since instituted seventeen years after the misconduct charged is belied by the facts that petitioner had been under interdiction until 1948, an earlier investigation had been deferred at his uncle's request because of petitioner's condition, and petitioner made no showing that the delay prejudiced the preparation of his defense. See R. 12–13.

CONCLUSION

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1956.